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No. 88-1082

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BABU PATEL and BANK OF RAVENSWOOD, as Trustee Under Trust No. 25-4621,

Petitioners,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether petitioners waived this Court's review of the constitutional issue alleged herein by their failure to raise the issue in the Seventh Circuit.

II. Whether Local Rule 31 of the Seventh Circuit, establishing an expedited briefing schedule in that Circuit, is consistent with Federal Rule of Appellate Procedure 31(a) specifically authorizing the Circuits to "shorten the period . . . for serving and filing briefs."

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Seventh Circuit's order of September 2, 1988 sets forth that Court's reasons for dismissing the petitioners' appeal. The order is reproduced in the Appendix to the Petition for Writ of Certiorari at page E-1.

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[1] Maryland Casualty Company is a wholly-owned subsidiary of American General Corporation, and has investments in the following: Advanced Technology System, Inc.; Marcasco Company.

STATUTES AND RULES INVOLVED

Federal Rule of Appellate Procedure 31(a)

Rule 31. Filing and Service of Briefs.

(a) Time For Serving and Filing Briefs. The appellant shall serve and file a brief within 40 days after the date on which the record is filed. The appellee shall serve and file a brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a Court of Appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases.

* * *

Local Rule 31, Seventh Circuit

Circuit Rule 31. Filing of Briefs and Failure to Timely File Briefs.

(a) Time for Filing Briefs. Except in agency cases, the time for filing briefs shall run from the date the appeal is docketed, regardless of the completeness of the record at the time of the docketing, unless the court orders otherwise.

* * *

PREFATORY NOTE: A PATTERN OF NEGLECT

Although largely accurate, petitioners' Statement of the Case omits several crucial facts.

Three times petitioners' case was dismissed by the District Court for want of prosecution. (Appendix to this brief, A-1, A-2, A-3). The case itself involved an untimely filing—the District Court granted respondent's motion for summary judgment based on petitioners' late filing of their lawsuit. (Page B-2 of Petition for Writ of Certiorari). It was in this context that the Seventh Circuit refused to accept petitioners' late-filed brief, noting:

> The district court history of this case is replete with further examples of counsel's carelessness and neglect. Counsel's performance adds up to a pattern of violation of both district court and appellate court rules. (Order of September 2, 1988)

Even petitioners' constitutional argument in this Court is untimely—it was not raised in the Seventh Circuit.

Petitioners' opportunity to be heard is not an "unqualified right" as they assert. It is indeed an *opportunity*, to be governed by the rules of procedure and practice of the Federal Courts. See, *Boddie v. Connecticut*, 401 U.S. 371 (1971). The failure of petitioners to follow Seventh Circuit Rule 31—a rule specifically authorized by FRAP 31—mandates denial of their petition for a writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

PETITIONERS HAVE WAIVED REVIEW BY THIS COURT OF THE SUBSTANTIVE ISSUE RAISED HEREIN. THEY DID NOT RAISE A CONSTITUTIONAL CHALLENGE IN THE COURT BELOW.

None of the arguments made by petitioners in this Court were raised in the Seventh Circuit. Therefore, the relief requested has been waived.

After petitioners failed to timely file their brief below, they were ordered to submit a memoranda of law in support of their motion to file a brief instanter. Petitioners' argument therein was limited to an explanation that they were not aware of Circuit Rule 31 and that their failure to file a timely brief amounted to excusable neglect. After the appeal was dismissed, petitioners filed a motion for rehearing. That motion was likewise limited in scope—it simply challenged the Seventh Circuit's finding that petitioners were careless and negligent.

Petitioners have taken a different tack in this Court, raising a purported constitutional issue for the first time. Having failed to make this argument below, the challenge has been waived. See, *Michael v. Louisiana*, 350 U.S. 91 (1956); *Yakus v. United States*, 321 U.S. 414, 444 (1943).

II.

THE PLAIN LANGUAGE OF FEDERAL RULE OF APPELLATE PROCEDURE 31(a) AUTHORIZES THE SEVENTH CIRCUIT TO ESTABLISH EXPEDITED BRIEFING SCHEDULES.

Petitioners' contention that an inconsistency exists between FRAP 31 and Seventh Circuit Rule 31 ignores the plain language of FRAP 31. The FRAP provides for the creation of shortened briefing schedules by local rule:

> If a Court of Appeals is prepared to consider cases and the merits promptly after the briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases or by order for specific cases. (FRAP 31(a))

Seventh Circuit Rule 31 meets the parameters of FRAP 31—the Circuit rule shortens periods prescribed by FRAP 31 for *all* cases before the Seventh Circuit. The Circuit rule is thus entirely *consistent* with FRAP 31. See, *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1222 (5th Cir. 1969); *League of Voluntary Hospitals and Homes of New York v. Local 1199, Drug and Hospital Union*, 490 F.2d 1398, 1401 (Temp. Emer. Ct. App. 1973); *9 J. Moore, B. Ward, Moore's Federal Practice*, Sec. 231.02 (Sept. 1986).

The constitutional argument raised by petitioners was rejected by the Court in *League of Voluntary Hospitals, supra.* The defendants therein claimed they were denied due process because the Court reduced briefing time. The Court found the Act at issue there, as well as FRAP 31(a), authorized the expedited briefing schedule. Several additional Circuits have likewise exercised the option granted by FRAP 31 and enacted local rules shortening the briefing process. See, e.g., Local Rule 31, First Cir-

cuit (reducing time for filing briefs from 40 to 35 days); Local Rule 31, Fourth Circuit (shortening time periods in criminal cases); Local Rule 31, Tenth Circuit (requiring time period for filing of brief to run from date notice of appeal is filed in certain circumstances); Local Rule 31-2.2, Ninth Circuit (reducing time in criminal cases).

The impact of the foregoing is apparent. Local Rule 31 of the Seventh Circuit is consistent with and indeed specifically authorized by FRAP 31. The petition for a writ of certiorari should thus be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

District Court Order, December 8, 1986 ..... A-1
District Court Order, July 28, 1987 ..... A-2
District Court Order, February 19, 1988 ..... A-3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: Dec. 8, 1986

Name of Assigned Judge: PAUL E. PLUNKETT

Case Title: Patel v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(11) ☒ This case is dismissed * * *
☐ pursuant to * * *
☒ General Rule 21 (want of prosecution)

* * * * *

☒ Docketing to mail notices.

Document #12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: July 28, 1987

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Babu Patel, et al. v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(2) ☒ [Other docket entry:]
Plaintiff failed to appear for status hearing.

* * * * *

(11) ☒ This case is dismissed * * *
☒ pursuant to * * *
☒ General Rule 21 (want of prosecution)

* * * * *

☒ Docketing to mail notices.

Document #32

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5488 Date: February 19, 1988

Name of Assigned Judge: JAMES H. ALESIA

Case Title: Babu Patel, et al. v. Maryland Casualty Co.

* * * * *

DOCKET ENTRY:

* * * * *

(2) ☒ [Other docket entry:]
Plaintiff failed to appear for status hearing. This case is dismissed for want of prosecution. The Court notes that this case was dismissed for want of prosecution by Judge Plunkett on December 8, 1986 and reinstated and again by this Court on July 28, 1987 and subsequently reinstated.

* * * * *

☒ Docketing to mail notices.

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